STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION	DOCKET NOS. INU-00-2 SPU-00-11

CONDITIONAL STATEMENT REGARDING GENERAL TERMS AND CONDITIONS AND ORDER REGARDING CHANGE MANAGEMENT PROCESS COMMENTS

(Issued March 12, 2002)

On February 10, 2000, the Utilities Board (Board) issued an order initiating an investigation relating to the possible future entry of U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), into the interLATA market. The investigation was identified as Docket No. INU-00-2.

In a filing dated May 4, 2000, Qwest encouraged the Board to consider a multi-state process for purposes of its review of Track A (competition issues)[1], various aspects of each item on the 14-point competitive checklist, § 272 (separate subsidiary) issues and public interest considerations. The Board considered the concept of a multi-state process for purposes of its review of a Qwest § 271 application, sought comment, and subsequently issued an order dated August 10, 2000, indicating that its initial review of Qwest's compliance with the requirements of 47 U.S.C. § 271 would be through participation in a multi-state workshop process with the Idaho Public Utilities Commission, North Dakota Public Service Commission, Montana Public Service Commission, Wyoming Public Service Commission, and the

[1] See 47 U.S.C. § 271(c)(1)(A).

Utah Public Service Commission. Since the time of that order, the New Mexico Public Regulation Commission has also joined in the workshop process.

A report was filed with the Board on September 24, 2001, addressing issues related to Track A, § 272, and general terms and conditions (GTC).[2] Only the GTC issues of the September 24, 2001, report are considered in this conditional statement.

The Board notes that Liberty was unable to address one issue in its report, defined as the change management process (CMP). The issue is described briefly at 14. Change Management Process. Qwest and the competitive local exchange companies (CLECs) have been involved in an extensive collaborative effort in an attempt to resolve CMP issues that apply to Qwest's operational support systems (OSS). Qwest made a filing on February 19, 2002, to update the status of this process. In that filing, Qwest proposed that CLECs and other participants to this proceeding be given a reasonable amount of time to file comments on the status report. The Board will defer its consideration of the CMP issue until all participants have been given an opportunity to respond to the February 19, 2002, filing. The Board will direct that any responsive filings be made on or before March 19, 2002.

The Board will first consider an issue that was previously considered in its June 22, 2001, conditional statement.[3]

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[2] This report was prepared by the "outside consultant," The Liberty Consulting Group (Liberty), which has been retained to assist the state commissions collectively by making recommendations for resolution of impasse issues. Unless otherwise specified, all references to the "report" refer to the report filed September 24, 2001.

[3] The Board issued a conditional statement on June 22, 2001, regarding the March 19, 2001, report filed by Liberty. The March 19, 2001, report (also referred to as the "Paper Workshop Report") addressed the following checklist items: Item 3 – Access to Poles, Ducts, Conduits, and Rights of Way; Item 7 – 911/E911, Directory Assistance, Operator Services; Item 8 – Directory Listings; Item

- Landowner Consent to Agreement Disclosure Issue (GTC Report pp. 15-17; Paper Workshop Report pp. 18-22; AT&T post-report (Paper Workshop) comments pp. 3-7)

The disagreement surrounds the question of whether Qwest must disclose to CLECs those agreements with private landowners and building owners that define Qwest's authority to occupy the property prior to the actual owners giving permission for the disclosure.

Liberty proposed additional language to the statement of generally available terms (SGAT) by way of a new Section 10.8.4.1.3.1, as follows:[4]

> Alternatively, in order to secure any agreement that has not been publicly recorded, a CLEC may provide a legally binding and satisfactory agreement to indemnify Qwest in the event of any legal action arising out of Qwest's provision of such agreement. In that event, the CLEC shall not be required to execute either the Consent to Disclosure form or the Consent Regarding Access Agreement form.

AT&T Communications of the Midwest, Inc., and AT&T Local Services on behalf of TCG Omaha (collectively AT&T) argued that a separate indemnification provision was not appropriate and that the general SGAT section on indemnification should apply.

The problem with AT&T's argument is that section 5.9 (indemnification provisions) of the SGAT apply to third-party actions arising from an SGAT signatory (whether Qwest or a CLEC) action that constitutes a "breach of or failure to perform"

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9 – Number Administration; Item 10 – Call-Related Databases and Signaling; and Item 12 – Local Dialing Parity.

[4] This language was initially recommended by Liberty, at page 21 of its March 19, 2001, report. Liberty again recommended this identical language in its report filed with the Board on September 24, 2001, at page 15.

an SGAT obligation. Providing the agreements to CLECs in this situation would actually constitute complete compliance with the applicable SGAT obligation.

Qwest was directed to include this new section 10.8.4.1.3.1 in its final SGAT by the Board's "Conditional Statement Regarding March 19, 2001 Report," issued June 22, 2001.[5] The previously proposed and adopted recommendation of Liberty will be reaffirmed by the Board.

The Board will next address an issue that appears to have mistakenly been listed in the September 24, 2001, report as having been resolved at the workshop. AT&T filed post-report comments on this issue.

- SGAT Definitions (Report p. 18; Qwest did not brief; AT&T did not brief; AT&T post-report comments p. 4 and Exhibit 1)

Liberty noted that Qwest filed the draft SGAT definition section prior to the workshop as required in this process. Liberty indicated that no briefs were submitted on this issue except for the definition of "individual case basis" (ICB). Thus, with the exception of ICB, Liberty concluded there was consensus on SGAT definitions. (Liberty's resolution of ICB, addressed at 18. Parity of Individual Case Basis Process with Qwest Retail Operations was uncontested.)

At the close of the workshops, the parties were still collaborating on SGAT definitions, according to AT&T's post-report comments. With its post-report comments, AT&T filed Exhibit 1, which was purported to be an updated SGAT definition section. AT&T stated that only the definition of "legitimately related"

[5] At pages 3-4 of the June 22, 2001, conditional statement, the Board adopted each of the recommended solutions to each of the issues that remained subject to disagreement in the report filed March 19, 2001. Liberty, at page 21 of its March 19, 2001, report, recommended the language shown here be added as new section 10.8.4.1.3.1.

continued to be in dispute.[6] AT&T asked the Board to modify Liberty's report to adopt the definitions contained in Exhibit 1, with the exception of the definition of "legitimately related."

However, it appears that AT&T's Exhibit 1 does not represent the most recent consensus on SGAT definitions. On November 30, 2001, Qwest made a filing in Montana indicating "all of the definitions except the term "legitimately related," are consensus and are accurately set forth in Exhibit A."[7] Therefore, it appears that Qwest and the CLECs continued to collaboratively develop SGAT definitions even after AT&T submitted Exhibit 1 with its post-report comments.

The Board directs Qwest to incorporate the most recent consensus definitions, except for the definition of "legitimately related," into the final SGAT. The definition of "legitimately related" is addressed at 3. Applying "Legitimately Related" Terms Under Pick and Choose.

For those remaining issues where the September 24, 2001, report indicates that agreement has been reached, the Board is prepared to indicate at this time its conclusion that Qwest has conditionally satisfied the checklist requirements related to general terms and conditions. To the extent that some of these issues are to be further evaluated in the Regional Oversight Committee (ROC) OSS test or some other proceeding, the Board will incorporate that evidence into its final recommendation to the Federal Communications Commission (FCC) as to whether

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[6] This disputed issue is addressed below under: 3. Applying "Legitimately Related" Terms under Pick and Choose.

[7] See Qwest Corporation's Comments on the Commission's Preliminary Report on SGAT General Terms & Conditions and Request for Comments on Findings, Docket No. D2000.5.70, pp. 21-22. Although not specifically a filing in this Iowa proceeding, the Montana Public Service Commission is one of the state commissions participating in the multi-state process with Iowa.

Qwest has fully complied with a checklist requirement. To the extent that an issue requires performance of some duty or activity on Qwest's part, Qwest will need to demonstrate that it adequately performs as expected in order for the Board to make a positive recommendation to the FCC following an application filed by Qwest.

After reviewing the portions of the September 24, 2001, report addressing GTC, the testimony, pre-report briefs, and post-report comments filed by those interested participants on GTC issues, the Board finds that no further proceedings are necessary to reach a conditional determination on those issues that remain subject to disagreement relating to GTC.

In discussing the Board's conditional recommendations on the remaining impasse issues, the numbering system utilized in the September 24, 2001, report will be followed.

IMPASSE ISSUES – GENERAL TERMS AND CONDITIONS

1. Comparability of Terms for New Products or Services (Report pp. 23-24; Qwest pre-report GTC brief pp. 3-6; AT&T did not brief; Qwest post-report comments p. 5)

AT&T proposed new section 1.7.2, which would require that Qwest offer new products and services on substantially the same rates, terms, and conditions as existing products and services when the new and existing products and services were comparable.

Qwest opposed the addition of this section, arguing that: (a) SGAT section 5.1.6 already obligated Qwest to price new products and services in accordance with applicable laws and regulations; (b) under the CMP, Qwest is obligated to allow CLEC input on new products before formally introducing them; (c) Qwest's rates are

already subject to review; and (d) the terms "comparable products and services" and "substantially the same rates, terms and conditions" are so vague as to invite lengthy, difficult to resolve disputes.

Liberty concluded that the additional language of AT&T would introduce substantial uncertainty over the applicability of standards and methods, and further determined that this situation is already adequately addressed by the SGAT.

The Board agrees with Liberty's conclusion that the situation has already been adequately addressed in another SGAT section. New section 1.7.2, proposed by AT&T is rejected.

2. Limiting Durations on Picked and Chosen Provisions (Report pp. 24-25; Qwest pre-report GTC brief pp. 8-10; AT&T pre-report GTC brief pp. 4-8; Qwest post-report comments pp. 5-6; AT&T post-report comments pp. 4-7)

AT&T argued that the "pick and choose" rights of CLECs should be allowed to extend beyond the duration of the originally negotiated agreement. For example, if the duration of an original agreement with CLEC A is two years, AT&T argued that CLEC B would be entitled to the same terms and conditions contained in the original agreement with CLEC A for two years from the time CLEC B opts into the agreement under “pick and choose.” This would hold true as long as CLEC B opted into the agreement anytime before the original agreement with CLEC A expired.

AT&T stated that the FCC created only three exceptions for when Qwest may offer different terms to CLECs under "pick and choose:" (1) where the service would cost more than it does to serve the carrier under the other agreement; (2) where it is technically infeasible to provide the service to the opting-in carrier; or (3) where the particular contract has been available for an unreasonable amount of time after its

approval.[8] AT&T suggests these provisions provide Qwest with ample opportunity to protect its interests while balancing the CLEC's need to opt into existing agreements.

Qwest argued that "pick and choose" provisions should retain the expiration dates of the original interconnection agreements, noting that if this were not the case, CLECs could continue an offering forever by perpetually re-opting into agreements. Qwest cited an FCC ruling that stated, "the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or portions of the agreement), including its original expiration date."[9]

Liberty stated that opting-in should not allow a CLEC to avoid other terms and conditions that relate to the provision being elected. The duration, or term, of an agreement operates as a fundamental limit on all of the rights and obligations (absent explicit exceptions) that a contract creates.

In its post-report comments, AT&T stated that nothing in the Act, the FCC's rules, or the FCC's orders support Qwest's position. AT&T argued Liberty's ruling would create a barrier to competition by demanding that interconnection provisions prematurely expire, and require CLECs to renegotiate every provision, regardless of whether the provision remains consistent with Qwest's obligations. Additionally, AT&T argued Liberty's ruling would require CLECs to arbitrate more agreements requiring the Board to assign expiration dates to the contract provisions, successfully delaying competition. AT&T did not provide any citations to FCC rulings specifically delineating its interpretation of "pick and choose."

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[8] 47 C.F.R. § 51.809(b) & (c).

[9] *In re Global NAPs, Inc.,* CC Docket No. 99-154, FCC 99-199, released August 3, 1999, footnote 25.

The Board agrees with Liberty's ruling that under "pick and choose," CLECs opt into expiration dates as originally negotiated, just as other provisions are taken as is.

3. Applying "Legitimately Related" Terms Under Pick and Choose (Report pp. 25-26; Qwest pre-report GTC brief pp. 10-11; AT&T pre-report GTC brief pp. 8-10; Qwest post-report comments p. 6; AT&T post-report comments pp. 7-9)

AT&T objected to Qwest imposing upon CLECs the obligation to accept more provisions from agreements than the specific provisions the CLECs wanted to pick and choose. AT&T claimed that in the past Qwest had abused the FCC's "legitimately related" standard by forcing CLECs to accept unrelated provisions. AT&T argued that Qwest must bear the burden of proof in establishing that a provision is "legitimately related."

Qwest argued that it could impose additional provisions on CLECs if the provisions were "legitimately related" to one another. At the workshop, Qwest agreed to add language to SGAT section 1.8.2 requiring a written explanation describing how certain provisions are related. In its brief, Qwest proposed changes to SGAT section 4.0 to define when provisions are "legitimately related." Qwest argued its proposed SGAT changes encompass the FCC's principles pertaining to "legitimately related" provisions. [10]

Liberty stated that the SGAT changes proposed by Qwest establish a proper foundation for resolving disputes. Liberty ruled that AT&T's evidence about Qwest's previous actions in imposing "legitimately related" provisions did not show a pattern

[10] See *First Report and Order on Local Competition*, CC Docket No. 96-98 & 95-185, released August 8, 1996, paragraph 1315.

of unreasonable conduct. Therefore, Qwest's past conduct does not require more than what the SGAT's changes will accomplish.

In its post-report comments, AT&T stated that Qwest's changes, under SGAT section 4.0, are inconsistent with law and Qwest's conduct. AT&T proposed deleting the latter part of the SGAT section 4.0 definition as follows:

> "Legitimately Related" terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under Section 252(i) of the Act, and not those that specifically relate to other interconnection, services or elements in the approved Interconnection Agreement. ~~These Rates, terms and conditions are those that, when taken together, are the necessary rates, terms and conditions for establishing the business relationship between the Parties as to that particular interconnection, service or element. These terms and conditions would not include General Terms and Conditions to the extent that the CLEC Interconnection Agreement already contains the requisite General Terms and Conditions~~.

The FCC has addressed this issue at paragraph 1315, of the *First Report and Order on Local Competition.* The relevant portion of paragraph 1315 is as follows:

> Given the primary purpose of section 252(i) of preventing discrimination, we require incumbent LECs seeking to require a third party agree to certain terms and conditions to exercise its rights under section 252(i) to prove to the state commission that the terms and conditions were legitimately related to the purchase of the individual element being sought. By contrast, incumbent LECs may not require as a "same" term or condition the new entrant's agreement to terms and conditions relating to other interconnection, services, or elements in the approved agreement.

It would appear that the shortened definition of "legitimately related," as advocated by AT&T, more closely matches the above FCC ruling. The parts of the definition that AT&T suggests deleting appear to go beyond the FCC's intent.

The Board directs Qwest to modify the definition of "legitimately related," in SGAT section 4.0, as proposed by AT&T in its post-report comments, eliminating the language shown as "stricken" above.

4. Successive Opting Into Other Agreements (Report pp. 26-27; Qwest did not brief; AT&T pre-report GTC brief p. 10; Qwest post-report comments p. 6)

AT&T argued that Qwest does not allow a CLEC ("CLEC 3") to opt into an agreement that itself is an agreement reached by a CLEC ("CLEC 2") that made that agreement by opting into an agreement with yet another CLEC ("CLEC 1"). Instead, Qwest requires that CLEC 3 opt into the agreement of CLEC 1, not into the agreement that CLEC 2 secured by opting into the agreement of CLEC 1.

Qwest did not respond to this issue.

Liberty reasoned that there were good reasons to permit this approach. Where Qwest agrees at the first opting in, by CLEC 2 above, and where the term of the first agreement is extended by agreement between Qwest and CLEC 2, Qwest should allow CLEC 3 to opt into the extended agreement. Without this opportunity, CLEC 3 would be denied an offering that Qwest has already agreed to make available when it reached the agreement with CLEC 2 to extend the term. Liberty recommended that the following language be added to the SGAT:

> Nothing in this SGAT shall preclude a CLEC from opting into specific provisions of an agreement or of an entire agreement, solely because such provision or agreement itself resulted from an opting in by a CLEC that is a party to it.

The Board directs Qwest to include the indicated language in its final SGAT.

5. Conflicts Between the SGAT and Other Documents (Report pp. 27-29; Qwest pre-report GTC brief pp. 14-17; AT&T pre-report GTC brief pp.

10-12; XO pre-report brief pp. 4-5; Qwest post-report comments p. 7; AT&T post-report comments pp. 9-12; XO post-report comments pp. 1-4)

AT&T stated that Qwest provided no evidence to indicate whether its tariffs contain any terms or conditions that may conflict with the SGAT. AT&T also stated that tariffs were generally subject to change at the sole discretion of Qwest. AT&T indicated that several commissions, including the Board, have approved interconnection agreements barring Qwest from attempting to alter interconnection agreements through tariff changes.

XO Utah, Inc., and Electric Lightwave, Inc. (Collectively XO), argued that one party to a contract cannot unilaterally change the terms of the contract. To amend the terms, there must be mutuality. Thus, XO argued for additional language to SGAT section 2.3. The language would prohibit Qwest, upon a complaint by a CLEC, from imposing the terms of any other document unless Qwest should prevail under the SGAT's dispute resolution procedures.

Qwest responded by modifying SGAT sections 2.3 and 2.3.1 to provide three policies governing disputes over conflicts between the SGAT and other documents. First, if a commission decision were to conflict with the SGAT, the commission decision would prevail.

Second, for the initial 60 days of a dispute, the parties will maintain the status quo. Upon expiration of the 60-day period, the decision-maker under the dispute resolution provision of the SGAT will develop an interim operating agreement to govern the parties' actions with respect to the disputed provisions. Upon completion of the dispute resolution process, the resulting amendment will become effective on

the date of the change of rates or on the date of the change of the other terms and conditions.

Third, in the event of a dispute regarding another document that abridges or expands the rights or obligations of either party, the rates, terms, and conditions of the SGAT would prevail. This language provides the decision-maker with a clear standard for resolving a dispute.

Liberty noted there are two scenarios for AT&T's concern about SGAT and tariff conflicts. The first would be when the SGAT references a specific tariff, and after the SGAT's adoption, the tariff changes. For that scenario, Liberty ruled that SGAT section 2.1 resolves the conflict by providing that the most recent tariff provision applies. This is appropriate given that there was agreement in the first place to subject certain aspects of the Qwest/CLEC contractual relationship to tariffs, which are changeable. Had there been intent to freeze the tariff provisions to those existing at the time of SGAT adoption, the actual wording of the tariff would have been used in the SGAT. Liberty noted that CLECs are not precluded from participating in tariff proceedings that affect them.

The second scenario would be when the SGAT contains no reference to a specific tariff, but after the SGAT's adoption, a tariff becomes effective containing terms that conflict with those in the SGAT. For this scenario, Liberty ruled that SGAT section 2.3 resolves the conflict by prohibiting the application of any new tariff provision (or other Qwest document) unless a public service commission or board decides otherwise. In the absence of such a decision, the rates, terms and

conditions of the SGAT would prevail. Thus, Liberty noted that SGAT sections 2.1 and 2.3 satisfy AT&T's concerns.

In its post-report comments, AT&T contended that Liberty's ruling would allow Qwest to unilaterally modify its contract with CLECs to accommodate any desired change via tariff or other document changes. Liberty's ruling would also allow Qwest to burden CLECs, or the Board, with a multi-layered dispute resolution process that would always work in Qwest's favor.

It appears that AT&T's basic concern is that Qwest has the ability to change the SGAT by changing tariffs or other technical documents relating to its provision of wholesale services. Liberty determined that SGAT sections 2.1 and 2.3, as proposed by Qwest, sufficiently limit Qwest's ability in this regard.

The Board notes that AT&T did make one point in its post-report brief that deserves additional consideration. AT&T indicated that its Iowa interconnection agreement precludes Qwest from attempting to alter the agreement through changes to tariffs. The current interconnection agreement between Qwest and AT&T lacks the language of SGAT section 2.1, which states that an SGAT tariff reference means the "tariff as amended and supplemented from time to time." AT&T's interconnection agreement states that Qwest shall "take all steps reasonably necessary to ensure that such tariff or other filing imposes obligations upon ILEC that are identical to those provided in this Agreement and preserves for the CLEC the full benefit of the rights otherwise provided in this Agreement."[11]

[11] See Docket Nos. AIA-96-1/AIA-96-2, Remand Agreement, Part 1, Section 20.2.

Therefore, it could be argued that in AT&T's currently effective interconnection agreement, tariff references were "frozen" and thus indicate tariffs in place at the time the interconnection agreement was originally approved or adopted. The question for the Board to consider is whether this is a reasonable approach for the SGAT.

Liberty noted that tariffs by their nature are changeable, and any tariff reference in the SGAT should indicate the most recently approved tariff. Liberty also noted that under CLEC opt-in rights, it would be difficult to know what tariff applies. This is because CLECs could opt-into older agreements and referenced tariffs may have already changed.

AT&T suggested a resolution to the problem in its pre-workshop testimony.[12] At that time, AT&T proposed that CLECs be provided notice and the opportunity to participate in all such tariff filings. Liberty apparently disregarded this proposal by noting that it would not demand too much of CLECs to maintain a reasonable level of diligence regarding tariff provisions relating to the SGAT or interconnection agreements. AT&T's resolution should be incorporated by adding the underlined sentence to the end of SGAT section 2.1 as noted below:

> Unless the context shall otherwise require, any reference to any statute, regulation, rule or Tariff applies to such statute, regulation, rule or Tariff as amended and supplemented from time to time (and, in the case of a statute, regulation, rule or Tariff, to any successor provision). <u>If Qwest proposes to amend or supplement a tariff referenced in this Agreement, Qwest shall provide notice to CLEC prior to a filing to amend or supplement the tariff.</u>

[12] See AT&T's Initial Comments on General Terms and Conditions, filed May 4, 2001, p. 18, Ex. WS_-ATT-___.

Regarding XO's concerns, Liberty stated that this is an issue about whose view should prevail while the SGAT dispute resolution process takes its course. Liberty saw XO's proposal as making the CLEC's view prevail during the dispute resolution process. Liberty ruled that the party obliged to provide service should retain the right to decide what it takes to provide that service while such disputes remain pending. XO's proposal would remove from Qwest the control that a service provider should have to define and manage the processes by which it provides services. Nevertheless, Liberty also ruled that this power should not be open-ended. Where the parties do not agree, an outside authority would be expected to act promptly to resolve the disagreement.

In its post-report comments, XO took issue with Liberty's contention that its SGAT proposal would make the CLEC's interpretation of the SGAT prevail during a dispute. XO alleged that its proposal only clarifies that the status quo, i.e., the express terms and conditions in the SGAT, will remain in place unless both parties agree to operate differently.

XO also stated that Liberty cited no legal authority for its proposition that the party obligated to provide service has the right to decide how to provide that service pending resolution of a dispute over the interpretation of the contract governing that service. XO argued it is the status quo that governs the contracting parties' relationship in a dispute, regardless of which party seeks to alter that arrangement, citing a Utah court, "[I]t is well-settled law that the parties to a contract may, by

mutual agreement, alter all or any portion of that contract by agreement upon modification thereof."[13]

Qwest's pre-report brief contained new language for SGAT section 2.3.1 that appears to address XO's concern that the status quo must govern the contracting parties' relationship in the event of a dispute. This language, however, did not appear in Qwest's frozen SGAT filed prior to the pre-report briefs, and Qwest did not include this language in its SGAT compliance filing subsequent to Liberty's report. The new section 2.3.1 language also negates the claim that Qwest has the ability to unilaterally modify the SGAT. Under the dispute resolution procedures, any changes to the SGAT would be determined by an arbitrator – not Qwest. The section 2.3.1 language, proposed in Qwest's pre-report brief, is as follows:

> If CLEC disputes, in good faith, that a proposed change in Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this SGAT abridges or expands its rights or obligations under this SGAT and that change has not gone through CICMP, the Parties will attempt to resolve the matter under the Dispute Resolution process. Any amendment to this Agreement that may result from such Dispute Resolution process shall be deemed effective on the effective date of the change for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered. During the pendancy of the Dispute Resolution, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, for up to sixty (60) days. If the Parties fail to resolve the dispute during the first sixty days after the CLEC institutes Dispute Resolution, the Parties agree that the first matter to be resolved during formal Dispute Resolution will be the implementation of an interim operating agreement between the Parties regarding the disputed issues, to be effective during the pendancy of

[13] *Rapp v. Mountain States Tel. & Tel. Co*., 606 P.2d 1189, 1191 (Utah 1980); accord, e.g., *Jones v. Best*, 134 Wn.2d 232, 240, 950 P.2d 1 (1998).

> Dispute Resolution. The Parties agree that the interim operating agreement shall be determined and implemented within the first fifteen (15) days of formal Dispute Resolution and the Parties will continue to perform their obligations in accordance with the terms and conditions of this Agreement, until the interim operating agreement is implemented.

The Board directs Qwest to add language to SGAT section 2.1 requiring Qwest to provide notice to CLECs prior to a filing that would amend tariffs referenced in the SGAT as indicated above. The Board also directs Qwest to include in its final SGAT the section 2.3.1 language filed in its pre-report brief as discussed.

6. Implementing Changes in Legal Requirements (Report pp. 29-30; Qwest pre-report GTC brief pp. 11-13; AT&T pre-report GTC brief pp. 12-13; XO pre-report brief p. 5; Qwest post-report comments p. 7; AT&T post-report comments pp. 9-12; XO post-report comments pp. 4-6)

AT&T and XO argued that Qwest's process for changing the SGAT to conform to changes in law is not balanced. The process would allow Qwest to stop offering a service almost immediately after any ruling that would eliminate an obligation to provide it. Conversely, the process proposed by Qwest does not recognize that it could take much more time to develop a service after a ruling creates an obligation to provide it. AT&T proposed that the SGAT provide a specific time period for parties to either: (1) mutually agree to change their agreement after a ruling or (2) resolve disagreements about the change through the SGAT dispute resolution procedures. AT&T said its proposal would create more balance in any transitions necessary after a change in law. Its proposal would also comport with the impairment of contracts provision of Article 1, Section 10 of the United States Constitution.

Qwest responded that its revised SGAT section 2.2 should satisfy AT&T's and XO's concerns. Qwest proposed a 60-day status quo maintenance period to allow

negotiation of disagreements about whether a change in law or rules would require a change in the SGAT. After that period, the SGAT dispute resolution provisions would apply, with an allowance for creating an interim operating arrangement pending completion of the procedures called for by those provisions. There would also be a "true-up" mechanism making the resolution of the dispute effective back to the effective date of the change in law or rules. Qwest argued the "true-up" is necessary to eliminate any incentive not to resolve disputes in a timely manner.

Liberty ruled that AT&T's impairment argument does not apply. The issue is what the contract, or SGAT, should say in the first place, not how to interpret it after the fact. Since the SGAT allows changes to be made pursuant to changes in legal requirements, there is no constitutional claim. Liberty stated that the SGAT should provide for a reasonable period for the parties to determine what changes are appropriate and necessary and how the changes should be implemented. Liberty found that Qwest's revised SGAT section 2.2 provides a reasonable means for accomplishing this end. It would allow for reasonably prompt adjustments after changes in legal requirements. Moreover, the "true-up" mechanism would allow an arbitrator to temper any resolution, if needed.

In its post-report comments, AT&T stated that the Board should reject Liberty's resolution, which seeks to override general contractual and constitutional principles. AT&T continued to endorse its SGAT proposal.

In its post-report comments, XO indicated that it favors maintaining the existing terms and conditions of the SGAT until resolution of the dispute. XO also indicated that it favors an eventual "true-up" mechanism with the effective date being

the same date as the change in law. The “true-up” would minimize delay as well as the impact of any delay.

Qwest’s proposal mirrors its proposal for 5. Conflicts Between the SGAT and Other Documents discussed earlier in this conditional statement. The differences between the parties’ proposals appear to be threefold. The first difference is the length of the interim period before moving to formal dispute resolution procedures. Qwest proposes up to 60 days, while AT&T and XO propose up to 30 days.

The second difference is the amount of time that the terms and conditions of the existing SGAT would apply. Qwest proposes to continue the SGAT’s existing terms during the 60-day interim period. If the dispute moves to dispute resolution, the first issue would be the development of a new interim operating agreement between the parties. The existing terms of the SGAT would also apply while the new interim operating agreement is being developed. AT&T and XO disagree with the concept of an interim operating agreement. They argue that the existing SGAT terms and conditions should apply until a final resolution.

The third difference is the "true-up" mechanism. Both Qwest and XO favor making the resolution of the dispute effective back to the effective date of the change in law or rules. AT&T’s proposal is silent on this point.

The most important of the three differences appears to be the "true-up" mechanism. Without it, any party who determines that a change in law or rules is not in its best interest would have little incentive to expedite negotiations in the interim period. Without this feature, it would seem more likely that disputes would have to be resolved by arbitrators under the SGAT’s dispute resolution procedures.

Resolving disputes by arbitration will increase the cost of changing the SGAT to comply with changes in law or rules. Thus, Qwest's proposal, which allows up to sixty days prior to arbitration for the parties to an agreement to work on a mutually agreeable resolution, appears to be sounder.

Finally, there is the issue of whether the terms and conditions of the existing SGAT should remain in place throughout the dispute. AT&T and XO argue that Qwest's proposal violates the impairment of contracts provision of the United States Constitution. The Board agrees with Liberty's contention that, if the SGAT is designed to be changeable to accommodate changes in legal requirements, there is no constitutional claim.

The Board will approve Liberty's recommendation and adopt Qwest's proposal for SGAT language as section 2.2.

7. Second-Party Liability Limitations (Report pp. 30-33; Qwest pre-report GTC brief pp. 20-22; AT&T pre-report GTC brief pp. 13-17; Qwest post-report comments pp. 7-9; AT&T post-report comments pp. 12-16)

AT&T argued for changes to SGAT section 5.8 which would increase Qwest's liability obligations. Specifically, AT&T urged that changes be made to the following SGAT sub-sections:

- 5.8.1 – To address the parties' liability for damages assessed by a state public service commission or board.
- 5.8.2 – To change Qwest's language addressing the inter-relationship between general damages provisions and the Qwest performance assurance plan (QPAP.)
- 5.8.3 - To remove Qwest's provision which would limit damages to the amount that would have been paid for services under the SGAT.

- 5.8.4 – To allow consequential damages for gross negligence and for bodily injury, death, or damage to tangible property caused by negligence.

- 5.8.6 – To expand Qwest's liability for fraud by CLEC customers.

Liberty noted that resolutions for the first two of AT&T's SGAT proposals appear elsewhere in its report. Damages awarded by state public service commissions or boards are addressed at 8. Third-Party Indemnification. The overlap between the QPAP and SGAT section 5.8 is properly addressed in Liberty's QPAP Report and the Board's conditional statement regarding a performance assurance plan.

Regarding SGAT section 5.8.3, Liberty ruled against AT&T's proposal to remove the provision limiting damages to the amount that would have been paid for services. Otherwise, Qwest's exposure to damages would be extended beyond the point that is reasonable in light of general commercial and telecommunications tariff experience.

For SGAT section 5.8.4, Liberty modified AT&T's proposed language as follows:

> Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct ~~(including gross negligence)~~ or (ii) ~~bodily injury, death or~~ damage to tangible real or tangible personal property proximately caused by such Party's negligent act or omission or that of their respective agents, subcontractors or employees.

Liberty noted that "gross negligence" is often difficult to prove and that there is precedent and good cause for leaving it out of commercial contracts. As for "bodily injury and death," these relate to third-party liabilities, which are not relevant to SGAT

section 5.8. This section is structured to address second-party liability, i.e. between the parties to the SGAT.

Regarding AT&T's proposal for SGAT section 5.8.6, Liberty ruled that fraud by end-user customers should be the primary responsibility of the carrier who provides the service used to perpetrate the fraud. Liberty noted that AT&T's proposed section 5.8.6 would appear to make Qwest responsible even though it was the wholesale provider. Liberty, therefore, proposed the following language for SGAT section 5.8.6:

> CLEC is liable for all fraud associated with service to its customers. Qwest takes no responsibility, will not investigate, and will make no adjustments to CLEC's account in cases of fraud unless: (a) such fraud is the result of any act or omission by Qwest, and (b) the ability to perpetrate such fraud was not contributed to by an act or omission by CLEC. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's customers, Qwest will promptly inform CLEC and, at the direction and sole cost of CLEC, take reasonable action to mitigate the fraud where such action is possible.

In its post-report comments, Qwest indicated that it would make the SGAT changes proposed by Liberty with the exception of section 5.8.6. Qwest indicated that during the course of post-report discussions with CLECs, Qwest had agreed to delete SGAT section 5.8.6 in light of consensus changes to SGAT section 11.34 (Revenue Protection) to resolve this issue. Thus, changes to section 11.34 would be made in the SGAT compliance filing in lieu of the Liberty's recommended changes to section 5.8.6.

In its post-report comments, AT&T stated that it is not appropriate to apply the limitations of liability used in retail tariffs to contracts between CLECs and Qwest. These types of retail tariff limitations are not applied to wholesale local service inter-

carrier relationships or to commercial contracts in general. Liberty has supported Qwest's view that it should not be liable for anything other than the cost of the service the CLEC paid, or would have paid to Qwest, in the year in which the nonperformance occurred. CLECs are dependent upon Qwest's services to compete in the local market. It is doubtful that a CLEC would enter the market if Qwest could fail to perform under the terms of an interconnection agreement or SGAT and essentially be insolated from any accountability for the harm actually caused to the CLEC by its failure.

AT&T also complained that the SGAT contains language stating, "If the Parties enter into a Performance Assurance Plan under this Agreement, nothing in this Section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan." AT&T stated that Qwest announced during the workshops that the QPAP was an exclusive remedy for the CLEC if adopted. Therefore, Qwest is attempting to avoid compliance with the QPAP in relation to a CLEC that opts for the limitation section of the SGAT, rather than the QPAP. The FCC has made clear that QPAP type plans are not the sole method for ensuring the Bell Operating Company's (BOC's) performance. The FCC looks to an array of damage recovery mechanisms including damages under performance assurance plans (PAPs), interconnection agreements, and state commission service quality rules.[14] Qwest should not be allowed to opt-out of its backsliding measures and eliminate a CLEC's right of recovery for breach of contract in its SGAT limitations.

[14] *SWBT Texas 271 Order*, paragraph 421.

There are two issues here for the Board to decide. The first issue for determination is whether the liability limitations in SGAT section 5.8.1 are appropriate for wholesale service between Qwest and CLECs. The language at issue, is as follows:

> Each Party's liability to the other Party for any loss relating to or arising out of any act or omission in its performance under this Agreement, whether in contract, warranty, strict liability, or tort, including (without limitation) negligence of any kind, shall be limited to the total amount that is or would have been charged to the other Party by such breaching Party for the service(s) or function(s) not performed or improperly performed. Each Party's liability to the other Party for any other losses shall be limited to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises.

Retail telephone tariffs generally contain liability limitation language insulating utilities from excessive damages resulting from loss of service. For example, Qwest's retail service tariff states that, in the case of an outage lasting more than 24 hours, a pro rata adjustment will be made to the customer's monthly charge.[15] Thus, retail customers could not expect to be reimbursed for additional losses (e.g. loss of profits) resulting from the loss of telephone service. Retail CLEC tariffs contain similar language.

AT&T's proposal for SGAT section 5.8.1 would increase Qwest's liability to amounts that are greater than what Qwest charges for wholesale service. One problem with the proposal is that it seems to ignore that a provider's rates must cover its cost of service. Presumably, Qwest's retail and wholesale rates only include amounts necessary to reimburse customers for the actual loss of service (i.e., what

[15] See Qwest's Iowa Tariff No. 1, Section 2, Original page 35.

the customer would have paid Qwest for the service not received). AT&T believes that Qwest should have greater liability when providing wholesale service, but the record does not indicate that AT&T is willing to pay higher wholesale rates to obtain it.

The second issue in AT&T's post-report comments relates to the overlap between the indemnity provisions of SGAT section 5.8 and QPAP. Liberty deferred that issue to its consideration of the QPAP in a separate report. The Board endorses Liberty's deferral of the issue to avoid deciding QPAP issues on a piecemeal basis.

The Board agrees with Liberty's resolutions for second-party liability limitations as discussed in this conditional statement. The SGAT language proposed by Qwest in its compliance filing for sections 5.8 and 11.34 should be incorporated into the final SGAT pending any changes resulting from the Board's review of the QPAP.

8. Third-Party Indemnification (Report pp. 33-35 - plus 12/5/01 e-mail from Liberty to "271 Superlist" noting error in Report; Qwest pre-report GTC brief pp. 22-26; AT&T pre-report GTC brief pp. 17-19 and Exhibit B Errata; Qwest post-report comments p. 9; AT&T post-report comments pp. 16-19)

AT&T argued that the indemnity provisions in SGAT section 5.9 must provide an adequate incentive for Qwest, as a monopolist, to avoid anti-competitive conduct. AT&T stated that Qwest is attempting to limit monetary responsibility for damages to CLEC end users to "the total amount that is or would have been charged for services not performed or improperly performed."[16] AT&T argued that the SGAT's indemnity provisions should more closely mirror those found in competitive markets between willing buyers and sellers.

[16] 6/4/01 Transcript p. 88.

Qwest argued that AT&T is seeking to unduly expand Qwest's exposure to claims, and that the SGAT, as proposed by Qwest, incorporates reasonable reciprocal indemnity rights and obligations. Under AT&T's proposal, CLECs could hold Qwest to unlimited liability relating to service outages. In contrast, Qwest's approach maintains the longstanding tariff-based limits that restrict customer damages resulting from performance-related breaches to direct damages and the cost of the services affected.

Qwest proposed to limit the parties' indemnification obligations for claims brought by those other than end-users of either party. The Texas Public Utility Commission approved this indemnity approach for interconnection agreements involving Southwestern Bell Telephone Company (SWBT). The FCC in approving the Texas application endorsed this approach, at least indirectly.

In discussing indemnification relating to service adequacy, Liberty noted two issues. The first issue relates to incentives that Qwest might have, as a monopolist, to provide its wholesale customers with less than adequate service. Liberty determined that this is an issue most properly addressed under the QPAP. The second issue relates to damage recovery for service outages. Liberty concluded that Qwest's SGAT indemnification proposal better reflects a "competitive market mirroring test" than AT&T's proposal.

Nevertheless, Liberty determined that Qwest's SGAT was written too broadly, and could result in Qwest being indemnified in cases where its negligence caused bodily injury to CLEC customers or physical injury to their property. Liberty, therefore, proposed the following additional language for SGAT section 5.9.1.2 to

preclude Qwest from transferring liability associated with actions that cause physical injury:

> The obligation to indemnify with respect to claims of the Indemnifying Party's end users shall not extend to any claims for physical bodily injury or death of any person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, alleged to have resulted directly from the negligence or intentional conduct of the employees, contractors, agents, or other representatives of the Indemnified Party. (Note: In a December 5, 2001, e-mail to the "271 Superlist," Liberty clarified that the terms "indemnified" and "indemnifying" were inadvertently reversed in its proposal for SGAT section 5.9.1.2 as filed in its September 24, 2001, report. The language shown here has been corrected pursuant to Liberty's e-mail.)

In its post-report comments, AT&T stated that Liberty's reasoning, about what constituted a competitive market, was speculative and should be rejected. AT&T asserts that although nothing in the record supports claims of "liberal damage provisions or liberal service-interruption benefits," Liberty concludes that AT&T's proposal somehow unfairly tags Qwest with such damages. According to AT&T, this is an astounding conclusion in light of the fact that the tariff limitations exist today and that the indemnity provision proposed by AT&T is reciprocal—that is, it applies with equal force to the CLECs, not just Qwest. AT&T contends there is no evidence to support Liberty's conclusions, and as a matter of law and fairness, such conclusions should not stand.

In a competitive market, a willing seller and a willing buyer would create more balanced indemnity provisions much like those state commissions have approved in AT&T/U S WEST (Qwest) interconnection agreements. Unlike the previously approved indemnity provisions that level the field, the SGAT slants the hill

dramatically in favor of Qwest. Under the Qwest proposed SGAT language, Qwest will indemnify CLECs narrowly, by excluding from indemnity claims brought against CLECs by end-users and injured parties, and by limiting monetary recovery under the indemnity provisions to "he total amount that is or would have been charged for services not performed or improperly performed."

The Board notes that the separate proposals of AT&T and Qwest, for most of SGAT section 5.9, are not materially different. Both proposals appear to subscribe to the general theory that:

> … each of the Parties agrees to release, indemnify, defend and hold harmless the other Party… from… any… liability… of any nature or kind, known or unknown… resulting from the indemnifying Party's… failure to perform under this Agreement …[17]

The difference appears to be in sub-section 5.9.1.2 where Qwest proposes the following language to extend indemnification to claims coming from either party's end-user customers:

> In the case of claims or loss alleged or incurred by an end user of either Party arising out of or in connection with services provided to the end user by the Party, the Party whose end user alleged or incurred such claims or loss (the Indemnifying Party) shall defend and indemnify the other Party and each of its officers, directors, employees and agents (collectively the Indemnified Party) against any and all such claims or loss by the Indemnifying Party's end users regardless of whether the underlying service was provided or unbundled element was provisioned by the Indemnified Party, unless the loss was caused by the willful misconduct of the Indemnified Party.

AT&T's proposal for SGAT section 5.9 contains no such proposal. AT&T states that its proposal is similar to the indemnity language previously approved in its

interconnection agreements with Qwest. This appears to be true based on language from interconnection agreements submitted by AT&T prior to the workshops.[18]

The end-user indemnity language discussed here may not have been included in previous interconnection agreements because Qwest may not have seen reason for such language. AT&T now argues that its proposal, which contains no end-user indemnity language, creates, "sufficient incentives for monopolists to "play fair" and not engage in anti-competitive and discriminatory conduct."[19] Therefore, it would appear that if AT&T's proposal is adopted, the Board could expect to see CLEC end-users filing claims against Qwest for unspecified losses associated with service outages.

In part, AT&T justifies its proposal by stating that it is reciprocal.[20] Thus, AT&T seems to be saying that its proposal is a balanced one, because Qwest's end-users could file claims against a CLEC for service outages. The problem with this reasoning is that, because it is Qwest's network that will serve Qwest and CLEC end-users alike, Qwest would appear to always have more exposure. AT&T's proposal would expose Qwest to more liability than a CLEC, and thus lacks the balance AT&T claims it adds.

The Board will adopt Liberty's resolution for this issue, including the corrections indicated by Liberty in its December 5, 2001, e-mail to the "271 Superlist."

9. Responsibility for Retail Service Quality Assessments Against CLECs (Report p. 35; Qwest pre-report GTC brief p. 26; XO pre-report GTC brief pp. 6-8; Qwest post-report comments pp. 9-10)

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[17] See AT&T's and Qwest's proposals for SGAT section 5.9.1.1.
[18] See AT&T's May 30, 2001, Supplemental Response on General Terms and Conditions, pp. 6-8.
[19] See AT&T's pre-report brief, p. 18.
[20] See AT&T's post-report comments, p. 17.

XO argued that Qwest should bear responsibility for assessments or fines levied against a CLEC that fails to meet a state commission's retail performance standards because of a failure by Qwest to provide the CLEC with SGAT-compliant service.

Liberty concluded that a more appropriate resolution to handle these concerns was for a CLEC to make arguments in proceedings either establishing such standards and assessments in the first place or in cases that are opened to enforce them.

No comments were filed objecting to Liberty's resolution of this issue. The recommended resolution appears to be appropriate based on the testimony.

10. Intellectual Property (Report pp. 35-36; Qwest did not brief; AT&T pre-report GTC brief pp. 19-20 and Exhibit C; Qwest post-report comments p. 10; AT&T post-report comments p. 20)

During the workshops, AT&T and Qwest disagreed about the intellectual property language in the SGAT. In its pre-report brief, AT&T indicated that following the workshops, Qwest and AT&T agreed to the language contained in Exhibit C to its pre-report brief. AT&T said the issue could be considered closed assuming Qwest adopted the Exhibit C language into the SGAT.

Although Qwest did not brief the issue prior to the report, Liberty noted there were differences between AT&T's Exhibit C and Qwest's "frozen" SGAT. Liberty stated there was no way to determine if the differences between the two documents were material to AT&T. Nevertheless, Liberty indicated that the issue was closed unless comments to the contrary were filed (i.e., Qwest's proposal would prevail unless AT&T provided a reasonable defense of its proposal).

Both AT&T and Qwest filed post-report comments. AT&T reiterated that the language in Exhibit C had been agreed upon, however, AT&T also stated that it would "converse with Qwest about the language in its frozen SGAT." Qwest indicated that the issue should be considered closed, and that the language in the frozen SGAT should be used.

After reviewing the differences between the two documents, the Board agrees with Liberty that it is not possible to determine if or how the differences are material to AT&T. In its post-report comments, AT&T failed to provide any showing beyond a statement that Exhibit C had been agreed upon that would explain the relevance of the differences.

The Board agrees with Liberty's determination that this issue is closed. The Board will adopt the intellectual property language as it appears in Qwest's frozen SGAT.

11. Continuing SGAT Validity After the Sale of Exchanges (Report pp. 36-38; Qwest pre-report GTC brief pp. 26-29; AT&T pre-report GTC brief pp. 20-22; Qwest post-report comments p. 10-11; AT&T post-report comments pp. 20-21)

AT&T proposed a number of SGAT provisions that would apply if Qwest were to sell exchanges containing end-users served by CLECs. Qwest agreed with several of the provisions proposed by AT&T. Qwest's frozen SGAT, however, contained no language to address the sale of exchanges.

Liberty noted that AT&T's SGAT proposals could prevent the transferee from executing a new agreement because CLECs could continue the SGAT, at least until the expiration date of the SGAT. Such a provision is problematic because the transferee may not have the same obligations under the Act as Qwest. Liberty

stated, however, that a CLEC should have the opportunity either to negotiate with the transferee or to seek relief from the state commission or board in the event that negotiations are not sufficient. To resolve the issue, Liberty proposed new language for SGAT section 5.12.2.

In its post-report comments, AT&T suggested two changes to the SGAT section 5.12.2 language proposed by Liberty. The changes are shown below:

> In the event that Qwest transfers to any ~~unaffiliated~~ party exchanges including end users that a CLEC serves in whole or in part through facilities or services provided by Qwest under this SGAT, the transferee shall be deemed a successor to Qwest's responsibilities hereunder for a period of 90 days from notice to CLEC of completion of such transfer or until such later time as the Commission may direct pursuant to the Commission's then applicable statutory authority to impose such responsibilities either as a condition of the transfer or under such other state statutory authority as may give it such power. In the event of such a proposed transfer, Qwest shall use its best efforts to facilitate discussions between CLEC and the Transferee with respect to the Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement.

In explanation, AT&T stated it is not clear why Liberty limited Qwest's responsibilities to transfers to "unaffiliated" parties unless it is assumed that any transfer to an "affiliated" party would transfer all Qwest's obligations for the duration of the existing interconnection agreements. Either the word "unaffiliated" should be removed or Liberty should clarify its reasoning. Similarly, where Liberty suggested that the "notice to CLEC" should be notice of the completion of the transfer, AT&T urges the Board to add the "completion of" language to make this provision clearer when it is read outside the context of Liberty's report.

In its post-report comments, Qwest indicated that it would adopt Liberty's resolution.

The Board agrees that the changes to SGAT section 5.12.2, as described in AT&T's post-report comments add necessary clarification. With those changes, the issue should be considered closed.

The Board will adopt the SGAT section 5.12.2 language proposed by AT&T in its post-report comments.

12. Misuse of Competitive Information (Report pp. 38-39; Qwest did not brief; AT&T pre-report GTC brief pp. 22-23; Qwest Supplemental Report dated 10-22-01, AT&T post-report comments pp. 21-22)

AT&T noted that 47 U.S.C. § 222(b) states:

> A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing a telecommunications service shall use such information only for such purpose, and *shall not use such information for its own marketing efforts*. (Emphasis added)

AT&T argued that Qwest abused the confidentiality requirement when it contacted a Minnesota customer seeking to switch service away from Qwest. AT&T asserted that Qwest must have learned of the impending switch through the local service request (LSR) submitted by AT&T. AT&T demands that section 271 relief be denied until Qwest corrects every mechanism through which retail marketing people can gain access to CLEC confidential customer information.

Liberty acknowledged the seriousness of the allegation, but it noted it was a single instance. Liberty also suggested that AT&T had not proven that the incident was the result of a breach in confidentiality. Liberty speculated that the incident could have been the result of a random telemarketing call to a Qwest customer who

volunteered information about the impending switch. Thus, Liberty ruled that the single incident did not support a conclusion that Qwest failed to meet its section 271 obligations. Nevertheless, Liberty ruled that Qwest must file a supplemental report addressing the measures to be taken to control the use of sensitive information.

In its post-report comments, AT&T criticized Liberty for its speculation and for not accepting AT&T's evidence at face value. Liberty allowed Qwest to augment the record with a supplemental report. AT&T requested that it too be allowed to file additional information showing that this was not an isolated incident.

On October 22, 2001, Qwest filed its "Report on Measures to Assure that Competitive Information Obtained through Qwest's Ordering Systems is Properly Protected" (supplemental report), stating it has processes and procedures in place to safeguard the use of CLEC marketing information. Qwest indicates that it enforces these processes and procedures and has a high level of confidence in them. This confidence is justified by the lack of any additional complaints in any of the seven states alleging conduct comparable to the single incident alleged by AT&T.

The supplemental report filed by Qwest notes a number of processes in place to safeguard the confidentiality of CLEC information. First, employees must complete annual training on the Code of Conduct. The Code of Conduct specifically forbids the improper use of wholesale customer proprietary network information.

Second, security is built into the interfaces used when LSRs are submitted by CLECs. Qwest's employees working in the wholesale area receive compliance training in order to protect confidentiality. Employees in other marketing units of Qwest have no access to this information.

Third, the databases used by Qwest marketing personnel contain no information about whether a customer has requested a switch in service. These databases are prepared six to eight weeks in advance of use. Therefore, the databases would have no information about a customer's recent decision to switch. In Iowa, residential customers who inform Qwest of a desire to switch to another carrier are not referred to a sales center. The customer representative will attempt to resolve any concerns about Qwest's service but will not attempt to retain the customer. If a customer switches service, Qwest does not attempt to win-back the customer until two weeks have passed. The database used for win-back marketing contains no information provided by CLECs to Qwest.

Fourth, customer service records show who accesses the records and why they are being accessed. Qwest's marketing personnel have no ability to search these records to determine if a customer wants to switch to another provider. Furthermore, these records only note an impending customer disconnect – not a switch to another provider.

Qwest also investigated the Minnesota incident noted by AT&T. A telemarketer contacted the customer on May 25, 2001, and was working from a list of names prepared weeks ahead of the date the customer says he notified AT&T of his desire to switch service providers. The telemarketer had no information that the customer had requested to switch service to AT&T. The customer desiring to switch service was an employee of AT&T. Qwest believes it is likely the customer/AT&T employee mistook a marketing call to sell new products and services for a call to

retain him as a customer. Qwest conducted a security check of the records in question and determined improper access had not occurred.

Qwest did not address this specific issue in its pre-report brief. Therefore, Liberty did not have an adequate record to conclude whether Qwest had actually breached its obligation to maintain confidentiality. In its pre-report brief, AT&T asked that Qwest be found in non-compliance with its § 271 obligations "until it demonstrates that it has corrected every mechanism through which Qwest's retail marking people gain access to CLEC confidential customer information."

It would appear that Liberty's ruling that Qwest file a supplemental report was reasonable in light of AT&T's position. However, AT&T in its post-report comments called Liberty's ruling an "after-the-fact solution." AT&T wanted to file additional information to address Liberty's speculation about the Minnesota incident.

Continuing to focus on the Minnesota incident is a red herring. It is unlikely that agreement would ever be reached over the facts surrounding the incident. The proper focus is whether Qwest has appropriate processes in place to protect confidential CLEC information in Iowa, as required by 47 U.S.C. § 222. Based on the information contained in Qwest's supplemental report, it would appear that Qwest has implemented policies necessary to comply with its statutory obligations.

Based on its review of the supplemental report, it appears to the Board that Qwest has appropriate processes in place to protect confidential CLEC information as required by 47 U.S.C. § 222.

13. Access of Qwest Personnel to Forecast Data (Report pp. 39-40; Qwest pre-report GTC brief pp. 30-32; AT&T pre-report GTC brief pp. 24-27; XO pre-report GTC Brief pp. 2-3; Qwest post-report comments pp. 11-12)

XO and AT&T expressed concerns with the sufficiency of the description included in SGAT sections 5.16.9.1 and 5.16.9.1.1 of those Qwest personnel who are able to see individual and aggregated CLEC forecast information.

Qwest's proposed language generally limits dissemination of individual forecast information to those with a need to use the information to manage Qwest's contractual relationship with the CLEC who provided it. The language would also permit legal personnel access when a legal issue arises about a specific forecast.

Liberty concluded that the language allowing access by Qwest to legal personnel was more open ended that it need be. Liberty recommended that the phrase "legal personnel, if a legal issue arises about that forecast" in SGAT section 15.16.9.1 be replaced with:

> Qwest's legal personnel in connection with their representation of Qwest in any dispute regarding the quality or timeliness of the forecast as it relates to any reason for which the CLEC provided it to Qwest under this SGAT.

The other concern relates to Qwest's use of aggregated forecast information. SGAT section 5.16.9.1.1 would allow Qwest to file or use aggregated CLEC data for any regulatory filing or for any other purpose generally related to fulfilling its SGAT obligations. The only limitation would be that Qwest would take precautions when it believes that aggregation will not be sufficient to protect the confidentiality of an individual CLEC's data.

Liberty again concluded that Qwest's proposed language was too open ended, noting that the protection of the information is too important to trust only to such a provision. It is reasonable to foresee that a state commission may have legitimate

needs for access to such information. Liberty recommended that Qwest be permitted to provide the data upon a specific state commission order requiring it, subject to the confidentiality requirements and processes applicable in the state requiring the information be provided, and upon notice by Qwest to the CLECs involved. Liberty recommended the following language replace SGAT section 5.16.9.1.1:

> Upon the specific order of the commission, Qwest may provide the forecast information that CLECs have made available to Qwest under this SGAT, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion.

This language would not allow Qwest to use aggregated CLEC forecast information for any other purpose whether or not related to fulfilling its responsibilities under the SGAT.

No comments were filed objecting to Liberty's resolution of this issue. The recommended resolution appears to be appropriate based on the testimony.

14. Change Management Process (Report p. 41; Qwest did not brief; AT&T pre-report GTC brief pp. 27-28; Qwest post-report comments p. 12)

AT&T cited the FCC's SWBT Texas 271 Order as requiring a CMP that meets five specific criteria. Qwest's CMP was not part of the briefs, thus, Liberty was not able to make a ruling on this issue.

SGAT section 12.2.6 describes the CMP as a component of "access to operational support systems." The CMP provides a forum for CLECs and Qwest to discuss and implement changes to Qwest's products, technical documentation, OSS interfaces, and processes that change CLEC operating procedures. Since Liberty

issued its report, Qwest and the CLECs have continued to meet to discuss the redesign of the CMP.

As previously discussed in this conditional statement, the Board will defer its consideration of the change management process until responses to Qwest's latest filing have been made and the Board has had an opportunity to consider them.

15. Bona Fide Request Process (Report pp. 41-44; Qwest pre-report GTC brief pp. 32-35; AT&T pre-report GTC brief pp. 30-31; Qwest post-report comments pp.12-13)

AT&T argues that the bona fide request (BFR) process does not meet the nondiscriminatory standard, noting:

A. There is no evidence to show that the BFR process would apply similarly to the process Qwest uses when its own end users ask for services not already provided for under tariffs.

B. There is no provision for Qwest to provide notice of previously approved BFRs with similar circumstances.

C. No objective standards are provided for standardizing products or services that result from repeat BFR requests.

Liberty notes that the first concern is really one of parity with a Qwest end-user request for non-standard retail services. Liberty concludes that there is not a sound basis for concluding that this retail process is analogous in purpose or scope to the wholesale BFR process and thus the parity standard that AT&T suggests is not appropriate.

The second concern relates to notice of previously granted BFRs. It is most likely that a BFR will be granted to a CLEC who is the first to ask for access that, in the past was not technically feasible, but which since has become feasible. Liberty concludes that it would be bad policy to require CLECs to continuously ask Qwest

whether technical barriers precluding an important form of access have not been eliminated. It is more reasonable to require Qwest to inform CLECs generally, because Qwest will know as soon as any material change takes place. The access granted to one CLEC through the BFR process becomes part of the requesting CLEC's contract with Qwest, and should therefore be available to other CLECs.

The third concern addresses standardization of products or services first made available through BFRs. Liberty concluded that there is not sufficient information, given the small number of BFRs to date, from which to determine whether Qwest can improve the process of moving from BFR to standardized product and service offerings.

Liberty recommended that the following language be included in the SGAT to address the three concerns discussed above:

> Qwest shall make available a topical list of the BFRs that it has received with CLECs under this SGAT or an interconnection agreement. The description of each item on that list shall be sufficient to allow a CLEC to understand the general nature of the product, service, or combination thereof that has been requested and a summary of the disposition of the request as soon as it is made. Qwest shall also be required upon the request of a CLEC to provide sufficient details about the terms and conditions of any granted requests to allow a CLEC to elect to take the same offering under substantially identical circumstances. Qwest shall not be required to provide information about the request initially made by the CLEC whose BFR was granted, but must make available the same kinds of information about what it offered in response to the BFR as it does for other products or services available under this SGAT. A CLEC shall be entitled to the same offering terms and conditions made under any granted BFR, provided that Qwest may require the use of ICB pricing where it makes a demonstration to the CLEC of the need therefore.

No comments were filed objecting to Liberty's resolution of this issue. The recommended resolution appears to be appropriate based on the testimony.

16. Scope of Audit Provisions (Report pp. 44-46; Qwest pre-report GTC brief pp. 37-39; AT&T pre-report GTC brief p. 31; Qwest post-report comments pp. 13-14)

Section 18 of the SGAT addresses audits, limiting allowable audits and examinations to "the books, records, and other documents used in the billing process for services performed" under the SGAT. AT&T urges the scope be expanded in order to allow audits and examinations of other aspects of performance under the SGAT.

Qwest responded that the SGAT's dispute resolution procedures were available if a CLEC had concerns in other areas of performance. Qwest expressed concern that broadening the scope of the examinations permitted under section 18 would provide an opportunity for a CLEC to get around the SGAT's dispute resolution discovery provisions. In addition, Qwest raised concern about the possible disruption that could result from "unfettered" CLEC examination rights, arguing that CLECs should not be allowed such deep access into the operation of its business.

Liberty properly noted that this situation has many facets that should be considered. The audits of information about billing are mutual, because both parties could make errors or omissions that affect bills. The parties will mutually exchange confidential or proprietary information.

Although there are natural limits to the boundaries of a billing examination, this is not true of confidential information. Any examination to investigate or discover who has what proprietary information could extend widely into each party's organization

and become disruptive. There is no evidence to show that these types of investigations or examinations have an important role in investigating compliance with SGAT requirements.

Liberty recommended the following language be added to the SGAT section on auditing to address audits of proprietary information use:

> Either party may request an audit of the other's compliance with this SGAT's measures and requirements applicable to limitations on the distribution, maintenance, and use of proprietary or other protected information that the requesting party has provided to the other. Those audits shall not take place more frequently than once in every three years, unless cause is shown to support a specifically requested audit that would otherwise violate this frequency restriction. Examinations will not be permitted in connection with investigating or testing such compliance. All those other provisions of this SGAT Section 18 that are not inconsistent herewith shall apply, except that in the case of these audits, the party to be audited may also request the use of an independent auditor.

No comments were filed objecting to Liberty's resolution of this issue. The recommended resolution appears to be appropriate based on the testimony.

17. Scope of Special Request Process (Report p. 46; Qwest pre-report GTC brief p. 36; AT&T pre-report GTC brief p. 32; Qwest post-report comments p. 17)

AT&T noted that Qwest limited the special request process (SRP) to unbundled network element (UNE) combination requests. Because the purpose of the SRP is to address deviations in a requested service from the circumstances that apply to services and products that have pre-established prices and other terms and conditions, AT&T argues that the SRP should be available for all non-standard offerings for which there is no question about technical feasibility.

Qwest did not respond to the merits of this argument, instead asserting that only how the process worked was to be addressed, not to what the process would apply.

Liberty indicated that Qwest took too narrow a view of the questions to be examined, and concluded that AT&T's request was reasonable. Liberty found, however, that the language contained in Exhibit F to the SGAT already does extend beyond UNE combinations, concluding that the SGAT already provided an adequate basis for streamlined consideration of access to UNEs not yet subject to standard terms and conditions.

No comments were filed objecting to Liberty's resolution of this issue. The recommended resolution appears to be appropriate based on the testimony.

18. Parity of Individual Case Basis Process with Qwest Retail Operations (Report p. 46; Qwest pre-report GTC brief pp. 36-37; AT&T pre-report GTC brief p. 33; Qwest post-report comments pp. 14-15)

AT&T incorporated its parity arguments already discussed in connection with the BFR process under this impasse issue. The discussion following issue 15. Bona Fide Request Process is equally applicable here. Parity with Qwest's retail operations is not an appropriate way to evaluate Qwest's execution of the SRP for CLEC requests.

No comments were filed objecting to Liberty's resolution of this issue. The recommended resolution appears to be appropriate based on the testimony.

SUMMARY

Assuming Qwest incorporates each of the recommendations as set forth above, verbatim, the Board is prepared to indicate at this time its conclusion that

Qwest has conditionally satisfied the General Terms and Conditions issues discussed in the September 24, 2001, report from Liberty Consulting Group. This conditional statement indicating these requirements are satisfied is subject to the same limitations noted earlier in this statement related to other proceedings and processes.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

Any participant desiring to file comments or responses to the February 19, 2002, CMP status update filing made by Qwest may do so on or before March 19, 2002.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 12th day of March, 2002.